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No. 657

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

J. L. WALKER,
Appellant,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CENTRAL FREIGHT LINES, INC.,
and W. W. CALLAN,
Appellees.

On Appeal From the United States District Court For the Western District of Texas

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant J. L. Walker appeals from a judgment of the United States District Court for the Western District of Texas, entered on September 11, 1962, dismissing his complaint and refusing to set aside

an order of the Interstate Commerce Commission. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is involved.

Opinions Below

The opinions of the District Court for the Western District of Texas, San Antonio Division, are reported in 204 F. Supp. 918 and 208 F. Supp. 388.[1] Copies of the final opinion of the District Court, the Judgment of that Court, and of the June 4, 1959, order of the Interstate Commerce Commission which is primarily under attack are included herein as Appendix A.

Jurisdiction

This suit was brought under 28 U.S.C. §§1336, 1337, 1398, 2321, et seq., and 5 U.S.C. §1009, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on September 11, 1962, and notice of appeal was filed in that Court on October 13, 1962. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *I.C.C. v. Hoboken Manufacturers' R. Co.*, 320 U.S. 368, 64 S. Ct. 159 (1943); *U. S. v. Baltimore & O. R. Co.*, 333 U. S. 169, 68 S. Ct., 494 (1948); *U. S. v. Han-*

[1] In the reported opinions, Appellant's initials are erroneously shown as "J. W." instead of as "J. L."

cock Truck Lines, 324 U.S. 774, 65 S. Ct. 1003 (1945).

Questions Presented

1. Whether the Order of the Interstate Commerce Commission dated June 4, 1959, is invalid because unsupported by findings and conclusions.

2. Whether said Order is invalid because it undertakes to approve a transaction not assented to by Appellant J. L. Walker.

3. Whether the Report and Order of the Interstate Commerce Commission dated August 6, 1957, is the final order of the Commission with respect to the only transaction assented to by Appellant.

4. Whether the Order of the Interstate Commerce Commission dated June 4, 1959, is invalid because inconsistent, incomplete and self-contradictory.

5. Whether the District Court was authorized to make its Order of October 9, 1961, remanding the case to the Interstate Commerce Commission and authorizing the Commission to entertain new proceedings designed to cure the defect in the Commission's Order of June 4, 1959.

6. Whether, in view of the pendency of this case before the District Court, the Interstate Commerce Commission was authorized to enter its Order of February 19, 1962, authorizing Appellee Central Freight Lines, Inc., to issue an additional $450,000 in promissory notes.

7. Whether the District Court was authorized

to hold, and was correct in holding, that the Order of February 19, 1962, entered by the Interstate Commerce Commission during the pendency of this case, sufficed to cure the defects in the Commission's prior Order of June 4, 1959.

8. Whether the Interstate Commerce Commission was authorized to undertake, by its Order of February 19, 1962, to approve the transaction some five and one-half years after the matter was first submitted to the Commission.

Statement

Appellant J. L. Walker owns 52.6% of the capital stock of Alamo Express, Inc., Alamo Cartage and W & H Investment Company, hereinafter referred to as "Alamo Express", "Cartage" and "W & H". The three corporations furnish an integrated common carrier motor carrier service to the public, with Alamo Express providing the actual over-the-road service, Cartage providing the pick-up and delivery service, and W & H owning or leasing the terminal facilities. The other 47.4% of the stock in the three corporations is owned by one Louis E. Hart.

On June 30, 1956, Appellee Central Freight Lines, Inc., acting through its president, Appellee W. W. Callan, entered into a contract with Appellant and Hart for the purchase of all of the capital stock of the three corporations. Under 49 U.C.S. §5(2)-(a)(i), it was necessary for the Interstate Commerce Commission to approve this transaction and authorize Central Freight Lines, Inc., (hereafter

referred to as "Central") to purchase the stock. Additionally, under the express terms of the contract, approval by the Commission was required.

Accordingly, by what are commonly referred to as "Section 5 proceedings", Central applied to the Commission for approval of the transaction, its application being docketed on or about July 10, 1956.

Central was to pay a total amount of $2,000,000 for the stock in the three corporations, $1,200,000 of this going to Appellant and $800,000 to Hart. $500,000 of the total consideration was to be paid in cash, and the remaining $1,500,000 was to be in the form of unsecured promissory notes issued by Central, notes in the amount of $900,000 going to Appellant and $600,000 to Hart.

Under 49 U.S.C. §§20a(2) and 314, Central was required to obtain Commission approval before it could issue the promissory notes with which to pay Appellant and Hart. Consequently, on or about July 23, 1956, Central filed an application with the Commission for approval of the issuance of such notes.

After hearing, Division 4 of the Commission entered a Report and Order dated August 6, 1957, in which it denied Central authority to acquire the capital stock of the three corporations and also denied Central permission to issue the promissory notes required under the contract with Appellant and Hart. *Central Freight Lines, Inc.—Control—Alamo Express, Inc.*, 70 M.C.C. 610 (1957). The Commission based its denials primarily upon a

finding that issuance of the promissory notes would cause Central to be over-capitalized by $955,000.

Central thereupon filed a petition for reconsideration and approval of the so-called "Modified Plan" whereby Central would assign to its president, Appellee Callan, the right to acquire the stock in W & H, with Callan to pay for such stock instead of Central. The purchase price of such stock was $1,000,000, and by passing this amount on to Callan personally, Central sought to avoid the finding that its participation in the entire transaction would cause it to be over-capitalized by $955,000.

Appellant J. L. Walker did not assent to the assignment to Callan or to any part of the "Modified Plan". Neither did he assent to the petition for reconsideration of the August 6, 1957, Order. On the contrary, he notified the Commission that he acquiesced in the August 6, 1957, Order; that he opposed the petition for reconsideration; and that he did not consent to the Modified Plan.

Nevertheless, by proceedings of dubious validity (which will not here be complained of), the Commisison undertook to reopen the case and consider the Modified Plan.

After additional hearings, the Commission, on January 22, 1959, issued a further Report and Order (R. 171) wherein it approved acquisition by Central of the stock in Alamo Express and Cartage, upon certain coditions, first among which was:

> "that the assignment of September 4, 1957, between Central Freight Lines, Inc., and W. W.

> Callan of the capital stock of W & H Investment Company owned by J. L. Walker, shall be cancelled and that there be substituted therefor a new contract providing for a direct purchase by W. W. Callan from J. L. Walker . . ."

At the same time, the Commission authorized Central to issue promissory notes in an amount "not exceeding $750,000", which amount was sufficient to enable it to purchase the stock in Alamo Express and Cartage only, and in no way would have permitted it to acquire the stock in W & H.

Appellant J. L. Walker refused to sell the W & H stock directly to Callan, with the result that Central could not comply with the condition upon which the January 22, 1959, Order was predicated. Accordingly, Central petitioned the Commission to delete this condition. Without further hearing, the Commission issued its Order of June 4, 1959 (Appendix A), which is the Order primarily under attack in this suit.

In the latter Order, the Commission deleted the aforementioned condition and, in lieu thereof, provided:

> "That W. W. Callan shall furnish a bond or other security approved by the Commission in an amount and form which will insure his financial responsibility under the assignment of September 4, 1957, of the contract of June 30, 1956, for the purchase by Central Freight Lines, Inc., of the capital stock of W. & H. Investment Company . . ."

Except for this change, and another which is not here pertinent, the Commission left in effect its

Report and Order of January 22, 1959, including the portion of the latter Order which authorized Central *only* to issue promissory notes in an amount ($750,000) sufficient to acquire *only* the stock of Alamo Express and Cartage. The Commission gave Central 180 days within which to consummate the transaction. Over objection of Appellant, the Commission subsequently extended such period until July 11, 1960, and then until January 9, 1961. By the latter date, this lawsuit had been filed, and the Commission thereupon extended the period for consummation indefinitely.

On August 8, 1960, this suit was filed by Appellant. Prior thereto, a suit was instituted in a district court of Bexar County, Texas, wherein Central and Callan are seeking specific performance of the contract with respect to Appellant, and Appellant is defending on various grounds, among which are fraud and the contention that the transaction has never been properly approved by the Commission, as required by law and by the express terms of the contract. The State court suit is still pending and is untried.

In the instant suit, Appellant made various contentions, chief among which are those stated in the first four questions posited above. One of these contentions was that, whereas the Order of June 4, 1959, apparently contemplated that Central could acquire the stock in W & H, and then pass the stock and the liability to pay for same on to Callan under bond, the Order was incomplete, inconsistent and self-contradictory in this respect, since Central

could obtain the W & H stock from Appellant Walker only by tendering to him its promissory notes as provided in the contract, but in its Order of January 22, 1959 (which the Order of June 4, 1959, left unchanged in this respect), the Commission had authorized Central only to issue sufficient notes to acquire the Alamo Express and Cartage stock, and had not authorized Central to issue a single penny in notes for the purpose of acquiring the stock in W & H. Consequently, Appellant argued that whereas, on the one hand, the Order of June 4, 1959, appeared to authorize Central to obtain the W & H stock from him, that Order and the prior Order of January 22, 1959, did not authorize Central to issue the promissory notes that would be required to enable it to obtain such stock.

During the argument before the three-judge Court, Circuit Judge Brown expressed amazement that the Commission would put itself in such a self-contradictory position, sharply questioning Appellant's counsel on this and expressing the belief that, by necessary implication, the Commission had authorized Central to issue the notes required to purchase the W & H stock. Later, when the Commission's counsel arose to make his argument, Judge Brown questioned him about this matter and, to the stated surprise of Judge Brown, the Commission's counsel agreed with Appellant's counsel that nowhere, at any time, had the Commission authorized Central to issue the notes which it would be required to give to Appellant Walker in order to acquire the W & H stock. The hearing before the three-judge Court terminated amidst the surprise

to Judge Brown and to counsel for Appellees Central and Callan occasioned by this admission.

Soon thereafter, the District Court issued its first opinion in this case, stating that:

> "The matter is therefore remanded to the Commission for clarification whether the approval of the §5 application does or does not constitute appropriate authorization under §214 for the issuance of the promissory notes to Walker (and Hart as appropriate) as called for in the initial contracts of June 30, 1956." 204 F. Supp. 918.

This action by the Court was, in effect, a request for the Commission to advise it whether the Commission agreed with the admission concerning the notes which its counsel had made during the argument of the case.

After considerable delay, the Commission replied that it did indeed agree with its counsel, saying:

> "In remanding the matter to us for clarification, the Court specifically questions whether approval of the section 5 application does or does not constitute appropriate authorization under section 214 for the issuance of the promissory notes to Walker (and Hart as appropriate) as called for in the initial contracts of June 30, 1956. *No such authority was intended*, either in our report and order of January 22, 1959, or our order of June 4, 1959, *because under the modified proposal such authority was no longer sought by Central.*
>
> "Our prior findings, as modified by our order of June 4, 1959, envisioned consummation

> of a transaction under which Central would issue its promissory notes of not exceeding $750,000, and Callan would acquire control of W & H as assignee of Central's obligation to purchase the stock of that company. Central *may not* acquire control of the three corporations through the issuance of $1,500,000 of its notes, for we approved *the issuance of notes only to a maximum of $750,000*; similarly, Central may not acquire control of W & H through a cash purchase, for this would depart substantially from the terms and conditions approved by us." (R. 250, Italics added)

However, during the period which the Commission took in replying to the Court's inquiry, Central and Callan filed a new application in which—for the first time since the Order of August 6, 1957 denying such authority—they sought permission to issue sufficient notes to enable Central to acquire W & H (R. 219). The Commission entertained such application and on February 19, 1962—the same day that it issued the aforementioned reply to the question sent to it by the Court—issued an order purporting to give Central authority to issue the required notes (R. 242)—an authority which, under the Commission's own admission, had not theretofore been granted and, indeed, had not theretofore been sought by Central under its so-called Modified Plan.

The three-judge Court (with Judge Rice dissenting) took the view that this new and belated action by the Commission cured whatever defects might have been present in the Order of June 4, 1959,

which is here under attack, and thereupon ordered that Appellant's complaint be dismissed.

The Questions Are Substantial

Several of the questions in this case are novel, and the rulings thereon will have a general effect extending far beyond their effect upon the parties to this particular suit. The importance and substantiality of the questions can best be shown by examining them individually.

1. *The order of June 4, 1959, is not supported by findings and conclusions.* A mere reading of the Order of June 4, 1959, demonstrates that it is wholly unsupported by findings and conclusions. In its Order of January 22, 1959, the Commission had made a lengthy report and had concluded that the purported assignment from Central to Callan of the W & H prong of the stock purchase contract must be cancelled and Callan must enter into a new contract directly with Appellant J. L. Walker. In its Order of June 4, 1959, the Commission changed its mind on this and decided that the purported assignment need not be cancelled, that Callan need not make a new contract directly with Appellant, and that some kind of bond would suffice. What fact findings dictated this change in the Commission's thinking between January and June? What new or different facts arose? What did the Commission conclude with reference to any such facts?

The new Order wholly fails to answer these questions.

Section 8(b) of the Administrative Procedure Act, 5 U.S.C. §1007(b) provides in part:

> "All decisions . . . shall become part of the record and include a statement of (1) *findings and conclusions, as well as the reasons or basis therefor*, upon all the material issues of fact, law or discretion presented on the record . . ." (Italics added)

This requirement has been held applicable to orders of the Interstate Commerce Commission, *Chicago & E. I. R. Co. v. U.S.*, 107 F. Supp. 118, aff'd, 344 U.S. 917, 73 S.Ct. 346; *Atlanta & St. Andrews Lay Ry. Co. v. U. S.*, 104 F. Supp. 193; *Capital Transit Co. v. U.S.*, 97 F. Supp. 614; and, indeed, even prior to passage of the Administrative Procedure Act, the courts had imposed this same requirement upon the Commission's orders.

Amarillo-Borger Express, Inc. v. U.S., 138 F. Supp. 411, vacated as moot, 352 U.S. 1026, 77 S.Ct. 593, presents a situation closely in point. There, as in the instant case, the Commission changed a prior order upon reconsideration. There, as here, the prior order contained ample findings and conclusions, but the order entered upon reconsideration did not. Speaking of the findings and conclusions of the earlier order, the Court said:

> "But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by the order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart."

Every word of this statement is, of course, squarely applicable to the modification of the January 22,

1959, Order by that of June 4, 1959. In the *Amarillo-Borger case*, the Court concluded:

> "The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the 'reasons or basis therefor'."[2]

The order of June 4, 1959, wholly failed to inform Appellant why the Commission had changed its mind. While this defect in the order is perhaps of less general importance than certain others which will be discussed below, nevertheless the question is a substantial one under the cited authorities, and certainly it is of much importance to all persons who appear before the Interstate Commerce Commission to know the extent to which the Commission can or cannot change its mind without stating the reasons therefor.

2. *The Order is invalid because it undertakes to approve a transaction not assented to by Appellant J. L. Walker.* This defect in the Order is of extreme general importance. From the time when, on August 6, 1957, Division 4 of the Commission refused to approve *the actual contract* to which Appellant J. L. Walker had agreed, to the time when the Commission issued its Order of June 4, 1959, the Com-

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[2] In the similar case of *Long Island Ry Co. v. U. S.*, 140 F. Supp. 823, the Court expressed the same thought by saying "It seems to us that these suitors were justly entitled to a recital of what it was that indicated the disappearance" of the original order. See also *Dixie Carriers v. U.S.*, 143 F. Supp. 844, vacated as moot, 355 U. S. 179, 78 S.Ct. 258; *Marine Transport Lines v. U.S.*, 173 F. Supp. 326; *Fine & Jackson Trucking Corporation v. U. S.*, 65 F. Supp. 443.

mission had been considering, not any actual transaction assented to by the parties, but rather a wholly hypothetical transaction advanced by Central and Callan which they hoped to get Appellant J. L. Walker to agree to, or to force upon him. What the Commission did both in its Order of January 22, 1959, and its Order of June 4, 1959, was to grant Callan and Central a "hunting license" which they could use in attempting to get Appellant to agree to the changes which they were trying to make in the actual contract. For the past three years, Appellant has been forced to try to run Alamo Express with the threat of this "hunting license" hanging over his head. Newspaper articles with headlines such as "WAY CLEARED FOR CENTRAL FREIGHT TO CONTROL ALAMO" have attended the Commission's action, and it goes without saying that such publicity has had injurious effects upon Appellant and Alamo Express in dealings with their employees and with present and prospective customers.

In *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 74 S.Ct. 74, this Court considered at length the history and purpose of Section 5 of the I.C.C. Act—the Section involved in the case at bar—and the Court said:

> "The history of these provisions is long and tortuous; its detailed summary is relegated to an appendix. Suffice it to say here that one clear thread which runs through a course of legislation extending over a period of twenty years, as well as through the various commentaries upon it, *is that only mergers voluntarily*

initiated by the participating carriers are encompassed by that statute and sanctioned by it . . .

"The role of the Commission in this regard has traditionally been confined to approving or disapproving mergers *proposed by the railroads to be merged . . .*" (Italics added)

The Commission takes the position that the doctrine of the *St. Joe* case is confined to situations in which strict mergers are submitted to the Commission, and that it does not apply when one carrier merely proposes to acquire control of another. However, this attempted distinction rests solely upon the Commission's *ipse dixit*. Certainly, no such distinction is made or even intimated in the applicable statute. Section 5(2) of the Act (49 U.S.C. §5(2)(2) provides:

"It shall be lawful, with the approval and authorization of the Commision, as provided in subdivision (b) of this paragraph—

"(i) for two or more carriers *to consolidate or merge* their properties or franchises, or any part thereof, into one corporation for the ownership, management and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, *to acquire control of another through ownership of its stock or otherwise . . .*" (Italics added)

Thus, the statute speaks of mergers and acquisitions of control in the same breath, without drawing

or suggesting any distinction whatever between them. Moreover, subdivision (b) of the same statute provides:

> "Whenever *a transaction is proposed under* subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission,"

and the statute then provides for the giving of notice and the holding of hearings thereon. As can readily be seen, subdivision (b) speaks only of "a transaction" proposed under subdivision (a), without making any distinction between a transaction in the form of a merger or a transaction in the form of an acquisition of control, and the statutory provisions for notice and hearing likewise fail to make any such distinction.

Consequently, the distinction which the Commission seeks to draw between merger and acquisition of control is purely on which it has thought up for itself, without any support whatever in the statutes or in the decisions.

In the *St. Joe* case, this Court told the Commission that it has authority only to act with respect to merger proposals voluntarily initiated by the parties. Upon a parity of reasoning, and with the identical statute being involved, it nesessarily should follow that the Commission has authority to act with respect to proposals for acquisition of control only when such proposals *are actual*, rather than hypothetical, and only when they *are voluntarily assented to by the affected parties.*

Even apart from the authoritativeness of the *St.*

Joe case, there is every reason why such a wholesome ruling should be made. If the jurisdiction of the Commisison is confined to approving or disapproving *actual* proposals to which the parties have *voluntarily assented*, then a situation such as the one at bar cannot arise, for the Commission, and applicants before it, will hereafter be unable to issue and obtain orders based upon unilateral proposals that force a third party into a dilemma in which he must either assent to such proposals or suffer serious economic injury by having the proposals and Commission approval thereof hanging over its head.

As is said above, since 1957 the Commission has been considering nothing except hypothetical proposals unilaterally submitted to it by Central and Callan, and it has been doing so not only without the approval of Appellant J. L. Walker, but over his repeated objections. If Central and Callan had been proposing that Central merge with Alamo Express, the Commission itself admits that, under the *St. Joe* case, it would have been powerless to entertain such a hypothetical proposal. Why should the rule be different merely because an acquisition of control, rather than a strict merger, has been unilaterally proposed by Central and Callan during the past five years? The same statute applies to the two situations; the logic applicable to them is the same; and the damage inflicted by Commission approval of a unilaterally proposed merger differs not a whit from that inflicted by Commission approval of unilaterally proposed acquisition of control. Surely, here are substantial and significant questions which are deserving of action and answer by this Court.

3. *The Report and Order dated August 6, 1957, are the final action of the Commission with respect to the only transaction assented to by Appellant J. L. Walker.* As a corollary of the contention just made, it necessarily follows that the Report and Order dated August 6, 1957, are the final action of the Commission with respect to the only transaction assented to by Appellant. In that Order, the Commission found that the transaction "would not be consistent with the public interest". Since the date of that Order, the actual transaction has never again come before the Commission, so the Commission's conclusion that such transaction "would not be consistent with the public interest" are the last words that it has spoken with respect to such transaction.

4. *The Order of June 4, 1959, is invalid because inconsistent, incomplete and self-contradictory.* As appears from what has been said above in the Statement of the case, in its Order of June 4, 1959, the Commission recognized the validity of the purported assignment from Central to Callan and undertook to authorize Callan to acquire the W. & H stock by giving some kind of bond. However, under the contract, Appellant was entitled to receive promissory notes from Central in the amount of $450,000 in payment for the W & H stock, and Appellant could not be required to sell the W & H stock to Central, to Callan, or to anyone else, unless and until he received the $450,000 in Central's promissory notes for which he had bargained. However, while on the one hand authorizing Callan to acquire the W & H stock, the Commission on the other hand had not authorized Central to issue a single cent in promis-

sory notes for the purpose of paying Appellant for such stock.

Because of this, Appellant argued in the District Court that the Order of June 4, 1959, was invalid because it was inconsistent, incomplete and self-contradictory. As stated above, Judge Brown at first refused to believe that the Commission had placed itself in such a paradoxical position, and he was inclined to the opinion that, in authorizing Callan to acquire the W & H stock, the Commission impliedly must have authorized Central to issue the $450,000 in promissory notes required to purchase such stock. The Commission's own attorney dispelled Judge Brown's views on this and told him that the Commission was indeed in such a paradox, and the Commission confirmed this in its reply to the Court's request for clarification of the Order of June 4, 1959.

As is hereafter discussed, simultaneously with its response to the Court's request for clarification, the Commission belatedly sought to remedy this defect in its Order by entertaining and granting Central's request for authority to issue the notes. However, as the situation stood when this lawsuit was filed and when it was heard by the District Court, the Order was defective for the reasons just stated. The District Court should have so held, and it erred in its ruling that such defect was cured by the action which the Commisison took during the pendency of the suit.

5. *In view of the pendency of this suit, the Commission was not authorized to enter its Order of*

February 19, 1962, authorizing Central to issue an additional $450,000 in promissory notes, and the District Court erred in holding that such action cured any defects in the Order of June 4, 1959, which is here under attack. Admittedly, the District Court had the power and right to ask the Commission to clarify its Order of June 4, 1959. However, the Commission seized upon this request as an excuse for entertaining an entirely new proceeding, instigated at the behest of Central and Callan, in which it sought to remedy the defect in its prior order by granting authority to issue an additional $450,000 in notes. Without hearing of any kind, the Commission granted the additional authority and advised the District Court of this grant at the same time that it answered the Court's request for clarification. The District Court has now held that the Commission's new action cures any defect in the Order which is here under attack.

This is odd law. Ordinarily, the facts in a lawsuit are considered as frozen when the suit is filed, or, at the very latest, when the suit is heard, yet here the District Court has permitted the Commission to tamper with the facts during the pendency of the suit and to salvage the Order under attack by means of such tampering. If this be the law, then appeal to the courts from improper administrative action will, in many cases, avail the aggrieved plaintiff nothing since, once he has demonstrated the impropriety of the administrative action, the agency can hastily change its action, or bolster up such action, during the pendency of the litigation and can then sanctimoniously tell the courts that

they must place their stamp of approval upon the very action that initially was improper. Moreover, as in the case at bar, the aggrieved plaintiff can even be taxed with the costs of instituting such an appeal, even though the appeal initially had merit and has come to naught solely because the administrative agency has changed the facts during its pendency.

Lawsuits, like proceedings before the Commission, should come to an end as soon as circumstances reasonably permit, and the Commission should not be permitted to prolong an appeal from one of its orders, or to expand the scope of such an appeal, by tampering with the facts and then calling upon the court to decide the suit, not upon the basis of the facts in evidence, but rather upon the basis of the facts as thus altered. If this is be the law, then appeals from administrative orders can well take on the aspects of a game in which the administrative agency is forced only to keep one jump ahead of the courts in putting patches on its original action.

Appellant has found no case in which such a remand for administrative action during the pendency of a lawsuit has been upheld.[3] Consequently,

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[3] The Commission has urged that *Evans v. Federal Communications Commission*, 113 F. 2d 166, is such case. However, the doctrine of that case was expressly limited by the Court to new applications filed with an administrative agency pending an appeal of an earlier order when the new application presents "facts and issues essentially different at least in some respects from those involved in the appeal." No such different facts and issues were present in the case at bar. Rather, the Commission passed upon precisely the same facts and issues that are involved in the appeal.

insofar as such a remand is concerned, the facts in this case and the ruling of the District Court are indeed unique, and there is thus presented a question which is substantial and of wide import, to litigants, administrative agencies and the lower courts alike.

6. *The Commission had no power to undertake to approve the transaction some five and one-half years after the matter was first submitted to the Commission.* In issuing its Order of February 19, 1962, in which the Commission for the first time undertook to approve the issuance of notes for the purchase of the W & H stock, the Commission said:

> "The public interest would not be served in the present proceedings by delaying our decision on the application pending the decision of the Court on the merits of the related proceeding."

This professed aversion to delay is belied by all of the Commission's prior actions herein. For more than five years, Central and Callan studiously refrained from asking the Commission for any authority to issue notes to consummate the W & H portion of the transaction. For more than five years, the Commission obligingly dallied around with unilateral variations upon the actual contract whereby Central and Callan thought they could avoid issuing such notes. Now, however, Central and Callan have been forced to seek this authority lest the Order of June 4, 1959, be stricken down, and the Commission has suddenly decided that "the public interest would not be served by delay".

Not a single thing even remotely related to the public interest required the hasty action that the Commission took with respect to the notes—action so precipitate that the Commission did not even see fit to conduct a hearing to up-date the evidence which it had received on Central's financial situation and other matters at the hearing conducted in 1956 and 1959. Salvaging the Order of June 4, 1959, and serving the interests of Central and Callan are solely the factors which dictated this new and hasty action on the part of the Commission, and the Commission is playing games with the courts when it pretends otherwise.

The extent to which the doctrines of limitations and laches are applicable to administrative agencies is, of course, wholly uncertain. Certainly, however, those doctrines, or some similar doctrine against stale action, should be invoked to prevent the occurrence of a situation such as the one at bar in which, although a transaction was submitted to the Commission in mid-summer of 1956, the Commission did not get around to making any decision whatever concerning a vital aspect thereof until late winter of 1962, some five and one-half years later.

WHEREFORE, Appellant J. L. Walker prays that the Court entertain this appeal and grant him appropriate relief as prayed for in his Complaint.

Respectfully submitted,

W. B. JACK BALL
HENRY W. MOURSUND
Frost National Bank Building
San Antonio, Texas

MAYNARD F. ROBINSON
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ATTORNEYS FOR APPELLANT

APPENDIX A

Final Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

J. L. WALKER,:

Plaintiff

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CENTRAL FREIGHT LINES, INC.,
and W. W. CALLAN.

Defendants

Civil Action No. 2864

BEFORE BROWN, CIRCUIT JUDGE, AND RICE AND INGRAHAM, DISTRICT JUDGES.

JOHN R. BROWN, Circuit Judge.

The subject of this case is the proposed acquisition by Central[1] and its principal owner and officer-director Callan[2] of Express,[3] a motor carrier, and two non-carrier affiliate enterprises, Cartage and

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[1] Central Freight Lines, Inc.
[2] W. W. Callan.
[3] Alamo Express, Inc.

W & H.[1] The sellers were Walker and Hart who owned 60% and 40%, respectively, of the capital stock of these companies. The purchase price as proposed in the 1956 contracts aggregated $2 million.

After a series of orders the Commission has granted a § 5 approval to Central and Callan for the acquisition of control of these enterprises. The sole plaintiff here is Walker, one of the two sellers. In a broad sort of way his position therefore is that the Commission may not legally approve the sale which he contracted to make. The Government and the Commission, quite understandably, attack the the standing of Walker to challenge the order of the Commission approving the sale and transfer Walker proposed to make.

On the initial submission and argument to us, a very serious question arose as to just what the Com-

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[1] Cartage: Alamo Cartage Company
W & H: W. & H Investment Company

[2] It was broken down as follows:

	Payments to Walker		Payments to Hart		Total
	(a) Notes	(b) Cash	(c) Notes	(d) Cash	(e)
I. Express	$225,000	$ 75,000	$150,000	$ 50,000	$ 500,000
II. Cartage	225,000	75,000	150,000	50,000	500,000
III. W & H	450,000	150,000	300,000	100,000	1,000,000
IV. Total Notes	$900,000		$600,000		$1,500,000
V. Total Cash	$300,000		$200,000		500,000
					$2,000,000

Recap.	(a) Notes	(b) Cash	(c) Total
VI. Express	$375,000	$125,000	$ 500,000
VII. Cartage	375,000	125,000	500,000
VIII. W & H	750,000	250,000	1,000,000
Totals	$1,500,000	$500,000	$2,000,000

mission had or had not intended. This grew out of the orders which in effect approved acquisition of Express and Cartage by Central since the acquisition (and obligation for payment) of W & H was, with Commission approval, to be made by Callan as assignee of Central. The problem then thought to be acute was whether by these orders and certain conditions imposed on Callan, the Commission in effect had simultaneously granted a § 214 approval for the issuance by Central of the promissory notes payable to Walker in part payment of the purchase price of his stock in W & H. This Court by brief opinion remanded the matter to the Commission for clarification and further orders, Walker v. United States, W.D.Tex., 1961, 204 F.Supp. 918.[7]

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[6] This would be $450,000. See Item III column (a), note 5, supra.

Of course the 1956 contract called for notes in the sum of $750,000 (see Item III, columns (a) and (c) and VIII, Column (a). But this included $300,000 of notes to Hart (see Item III, Column (e). Hart has subsequently made a supplemental agreement, approved by the Commission, dispensing with these notes.

[7] At three places we made an error (which fortunately misled no one) in trying Walker, Central and Callan together in various contentions. The italicized words should be deleted from this portion: "As *Walker and* Central and Callan read this order * * *." 204 F.Supp. 920. Italicized words should be inserted in this portion: "On the other hand. Counsel for the Commission (*as well as Walker*) reads the * * * orders in a different way." 204 F.Supp. 920. And the portion "by all except the Commission's Counsel" should be deleted and the italicized words substituted so that the phrase reads: "At the same time it is urged *by Central and Callan* that the provision for the surety bond * * *" 204 F.Supp. 920.

The Commission, pursuant to this remand, has taken further action and has, as directed by us, now certified to us two additional separate, but simultaneous orders, and reports.* Before discussing these supplemental reports or assaying their legal significance, we think it helpful to repeat here the broad latitude we afforded the Commission in its reconsideration under our interim remand:*

> "[1] The matter is therefore remanded to the Commission for clarification whether the constitute appropriate authorization under § 214 for the issuance of the promissory notes to Walker (and Hart as appropriate) as called for in the initial contracts of June 30, 1956. [2] We do not undertake to prescribe the manner in which the Commission is to conduct further proceedings except that it is requested that the matter be expedited to the maximum possible extent, and that in the supplemental orders or reports, the Commission indicate with appropriate required specifications its findings, reasons and conclusions with respect to the total amount of promissory notes payable to Walker (or Hart as appropriate) which Central is authorized under § 214 to issue. [3] In the event the Commission were to approve the issuance of prom-

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* Each is dated February 23, 1962. One bears the style "M.C.—F—6339—Central Freight Lines, Inc.—Control—Alamo Express, Inc." as previously. But to this is appended a footnote "This report embraces Finance Docket No. 19431, Central Freight Lines, Inc."

The other report is styled "Finance Docket No. 21819, Central Freight Lines, Inc., Note."

* For ease of discussion we have inserted the numbered brackets [1], [2] and [3].

issory notes payable to Walker (or Hart as appropriate) in sums less than the aggregate called for by the initial contracts of June 30, 1956, the findings, reasons and conclusions should also cover expressly the general problem of whether there may be a § 5 approval as a proposed transaction since any such limitation on the amount of securities might mean that the transaction could not be consummated in literal compliance with the terms of the private contracts." 204 F.Supp. 921.

Insofar as the report in the so-called control case Docket MC-F-6339 is concerned, the Commission's supplemental report reflects that as a current interpretation of a prior event, the Commission holds that its approval of the assignment to Callan of Central's proposed purchase of W & H and the condition requiring Callan to furnish a surety bond against contingent liabilities on Central's part did not impliedly authorize the issuance of Central's promissory notes payable to Walker in the additional amount of $450,000.[10]

If the matter stood there, a considerable question might exist as to whether there was not such a marked departure from the terms of Walker's 1956 contract with Central that it would be a wholly academic thing for the Commission (or this Court in review thereof) to go through the motions of approving such a drastically revised contract as the "proposed transaction," § 5, 49 U.S.C.A. § 5. But it does not stand there. This is so because the Com-

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[10] See note 6, supra.

mission, simultaneously with its consideration of the Control Case, conducted an additional proceeding under the new Finance Docket No. 21819 (see note 8, supra) and in its simultaneous order it likewise approved the issuance by Central of the additional $450,000 promissory notes payable to Walker at times, amounts and at interest rates precisely in accord with the 1956 agreement.

This whole case—both before and subsequent to our limited remand—has been needlessly complicated by the Commission's persisting in the fiction that the "control" and the "Finance" matters are separate. We can acknowledge, of course, that as to each, different statutory requirements and principles must be satisfied. Likewise, as a matter of administrative housekeeping, it perhaps makes for a more neat and orderly disposition to segregate them by separate docket numbers. At the same time, they are one proceeding. Each must be read in the light of the other. The express deficiency of one may be overcome by the express or implied conclusions of the other and, conversely, the express grant in one might be markedly affected by an implied condition in the other. Thus, issuance of a § 5 approval of the "proposed" transaction necessarily has to take into account the *method* of financing. On the other hand, approval of the issuance of securities in a § 214, 49 U.S.C.A. § 314 finance proceeding necessarily takes into account the occasion (i. e., necessity) for such financing. Each is interdependent. Each is interlocked.

And whatever might be the treatment to be accorded this segregation of dockets in the normal situation (either on a statutory review or while

pending before the Commission for administrative action), the terms of our remand to the Commission obviously contemplated that the Court was seeking guidance and direction from this expert body on whether the transaction as a whole was or was not presently approved. The language used by us in sentence [1] does speak in terms of "clarifying" whether the existing order or orders now constitute appropriate authorization. But it is plain by sentence [2] that three things were contemplated. First, it was recognized that the Commission had to hold further proceedings. As to these we disclaimed any purpose "to prescribe the manner in which the Commission is to conduct further proceedings," 204 F.Supp. 921. Second, we recognized that its action might be in several papers as we referred to "the supplemental orders or reports" which the Commission would issue. Third, and of more importance, we expressly required that "the Commission indicate with appropriate required specifications its findings, reasons and conclusions with respect to the total amount of promissory notes payable to Walker * * * which Central *is* authorized under § 214 to issue." 204 F.Supp. 921. We italicize the word "is" to emphasize that we were seeking current, contemporary determination by the Commission. We were not concerned merely with previous determinations. The issue was squarely presented to us: what notes, if any, has the Commission authorized Central to issue to Walker for W & H stock? We needed, and we sought, determination of that precise problem by the Commission. Moreover, our order invested it with adequate authority

to undertake such proceedings as in the Commission's judgment might be required. This is made doubly clear by the terminology of sentence [3] which in terms of futurity spoke of "in the event the Commission *were* to approve the issuance of promissory notes * * * in sums less than the aggregate called for * * *." 204 F.Supp. 921.

This Court was concerned with the amount of promissory notes which the Commission authorized Central to issue to Walker for W & H stock. This Court was not concerned with the manner in which the Commission, under its procedures, felt obliged to manifest the decision. Where the Commission chooses to chop a single thing into two bits, we are not so handicapped. Rather, we interpret the simultaneous reports growing out of one transaction as a single determination. In this approach, we are able to distill from two simultaneous decisions the following: in addition to the authority to issue promissory notes payable to Walker and Hart in the amount of $750,000 in payment for stock in Express and Cartage (see note 5, supra), Central is also now formally authorized to issue a note payable to Walker in the sum of $450,000 representing the agreed deferred price for his stock in W & H (see note 6, supra). Thus an aggregate of $1,200,000 in promissory notes is now approved.[11]

As it is specifically to be a promissory note of Central payable to Walker, this means that the Com-

[11] The remaining $300,000 of promissory notes specified in the 1956 contract represents the deferred payment to Hart as to which an approved supplemental agreement has been made, see note 6, supra.

mission necessarily approves Central performing this obligation imposed on it by the terms of the 1956 agreement.[12] In no other way could the Commission conceivably have approved the execution and issuance by Central of its note payable to Walker in any such substantial sum. Of course, it is equally plain that behind this approval is the fact that as between Central and Callan the Commission considers that Central has assigned to Callan its rights and obligations under the 1956 agreement with respect to W & H. Likewise it is equally positive that without that assignment *vis-a-vis* Central and Callan the Commission would not have approved either the proposed transaction or the issuance of the additional note in the sum of $450,000. This latter is decisively demonstrated by the meticulous provisions set forth in the Finance Docket report and order, the effect of which is that while Central has an outstanding obligation to Walker (or those holding the note of which he is the payee) for $450,000 payable over a 10-year period, it actually has none. This is so because Callan is required simultaneously to "pay for" the note before issuance to Walker, and Central is then required to invest this "payment" by Callan in interest bearing securities for periodic sale to supply the funds for retirement of the note as installments fall due.[13] As to that por-

[12] The report in Finance Docket 21819 states: "The additional note would be payable in the manner specified by the contract of June 30, 1956, in 10 equal annual installments * * *."

[13] The report reads: "The note would be issued and de-

tion of the sales price of W & H stock payable in cash to Walker ($150,000, see note 5, supra), there was no need for this elaborate machinery since under the Central-Callan assignment, the cash would come from Callan for delivery to Walker through Central as a conduit. But so far as Commission approval is concerned, Walker has no right to complain that, either for the note given to him by Central for W & H stock, or the cash turned over to him by Central for the cash payment, it is Callan who ultimately bears the risk and, upon final consummation of the transaction it is Callan, not Central, who will end up owing W & H.

[1–4] Since we regard the report in Finance Docket 21819 as a supplemental and integral part of the pending Commission proceedings under review, it follows that whatever attack Walker has made, or makes, as to the supplemental report in MC-F-6339 is available to him as to it as well. This is so even though no separate appeal has formally been taken. Walker's contention that this supplemental order is invalid because "wholly *in camera*" is unfounded. Walker had notice of the application and filed a formal pleading seeking the outright dismissal of the "new" application. He was not denied the right to participate in it. Indeed, he seemed to regard it with disdain. Walker fails likewise as

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livered only after payment of its full face value in cash to Central by Callan. The proceeds of its sale would be placed by Central in a special fund to be invested in interest bearing securities returning at least 3½ percent per annum, and the securities would be converted to cash in annual amounts equivalent to the payments on the note as they become due."

to the merits. There was no need for any further or new evidence since Callan is required to provide in advance the funds with which to make the cash payment and to fund the retirement of the note. Broad jurisdiction is granted to the Commission on the issuance of securities. Its jurisdiction is "exclusive and plenary." The Commission, in approving issuance of securities, is to determine whether the issuance will be "compatible with the public interest" and whether issuance "* * * is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public * * *." § 20a(2), 49 U.S.C.A. § 20a(2). The application has to be in writing properly verified, § 20a(4), and notice is expressly required only as to the governor of relevant states and other public agencies. § 20a(6). The necessity and type of hearings, as such, is left broadly to the Commission. "The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority." § 20a (6). Alleghany Corp. v. Breswick & Co., 1957, 353 U.S. 151, 175, 77 S.Ct. 763, 1 L. Ed.2d 726, and see also Breswick & Co. v. United States, S.D.N.Y., 1957, 156 F.Supp. 227, 230, reversed on other grounds, 355 U.S. 415, 78 S.Ct. 421, 2 L. Ed.2d 374. And for quite understandable reasons, the statute expressly recognizes that Commission action may be complete or partial, final or conditional, and that as conditions change, it may "from time to time, for good cause shown, make such supplemental orders * * * as it may deem necessary or appropriate * * *" § 20a(3). Arrow Transportation Co. v. United States, N.D.Ala., 1959, 176 F.

Supp. 411, affirmed 361 U.S. 353, 80 S.Ct. 406, 4 L.Ed.2d 362; and see cases in which the Commission has reopened proceedings pending review United States v. Chicago, Milwaukee, St. Paul & P. R. Co., 1935, 294 U.S. 499, 504, 55 S.Ct. 462, 79 L.Ed. 1023; Koppers Co., Inc. v. United States, W.D. Pa.1958, 166 F.Supp. 96; Boston & Maine R. v. United States, D.Mass., 1957, 153 F.Supp. 952.

Reading all of these Commission reports, including the two latest ones, together, practically all of the points urged so vigorously by Walker now wash out. Thus we find it unnecessary to consider specifically the subsidiary, though threshold dispute, over whether Walker has standing as such to challenge these orders. We may assume, without deciding, that he does.

[5] But standing to challenge is quite distinct from the scope of the challenge which may then be made. Here Walker is in a unique position. He made a contract to sell all of his interest in all of these companies. Whatever rights the Texas State Court litigation may accord him in avoiding fulfillment of the contracts, he may certainly not contend before the Commission that the contract he made was illegal.

[6] Again, assuming that as one having "standing" he may perhaps have the right to demand procedural orderliness, his appeal fails on its merits. In effect he asserts that the Commission after first disapproving the 1956 contract because of apprehended overcapitalization, did not have the power either to change its decision or grant extensions of

time for consummation of the transaction when and as approved. Especially is this true, says Walker, when this was done over his protest that the Commission should not honor any application for rehearing or relief filed by Central unless joined in by him. As to this, Walker was not the applicant for a § 5 approval. This was not a merger or two carriers seeking permission to combine. It was an application by a carrier (Central) to acquire control over another carrier (Express) and the applicant was Central (and Callan as one in control of a carrier under the Marshall Transport Doctrine." §§ 5(2) (a) (i) and (b), 212(b).

With regard to rehearing and timeliness the Commission has great latitude under the statute. §§ 5(2) (b), 16(6) and 204(a) (6), 49 U.S.C.A. §§ 5(2) (b), 16(6), 304(a) (6). See also Seatrain Lines, Inc. v. Pennsylvania R. Co., D.N.J., 1952, 108 F.Supp. 113, 126; Philadelphia-Detroit Lines v. United States, S.D.Fla., 1939, 31 F.Supp. 188, aff'd 308 U.S. 528, 60 S.Ct. 284, 84 L.Ed. 446; Lubetich v. United States, WD.Wash., 1941, 39 F. Supp. 780, aff'd 315 U.S. 57, 62 S.Ct. 440, 86 L.Ed 677; Los Angeles-Seattle Motor Express, Inc. v. United States, W.D.Wash., 1941, 39 F.Supp. 783. Additionally, with this three-ring Donnybrook proceeding before the Commission, this Court and the State Court, there was every reason why, for the protection of Walker and all others, the time for consummation was successively extended in the past, just as it

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[14] United States v. Marshall Transport Co., 1944, 322 U.S. 31, 64 S.Ct. 899, 88 L.Ed. 1110.

must be for the future, until such time as the legal rights of the parties to the 1956 contract are judicially determined and the transaction either closed or abandoned.

[7, 8] The attack fares no better as to either sufficiency of evidence or the findings. As for the former, we would doubt seriously that a seller in a contract expressly subject to Commission approval may even question the validity of the agreement or the propriety of its consummation. But assuming any such right, the Commission had an abundance of evidentiary support for its approval in principle of the sale and the transfer of control. The only doubt ever expressed by the Commission has been its apprehension as to overcapitalization of Central had the transaction been consummated without the conditions and provisions now imposed (as between Central and Callan). So far as these represent matters which Walker may challenge, the Commission reports are quite sufficient to indicate the basis for Commission action. Amarillo-Borger Express, Inc. v. United States, N.D.Tex., 1956, 138 F. Supp. 411, vacated as moot, 352 U.S. 1028, 77 S.Ct. 594, 1 L. Ed.2d 598; Dixie Carriers v. United States, S.D. Tex., 1956, 143 F.Supp. 844, vacated as moot, 355 U.S. 179, 78 S.Ct. 258, 2 L.Ed.2d 186. In dealing with the objection of over-capitalization, the Commission has adequately revealed why each of the various proposed conditions or modifications of them will satisfy the demands of and "be consistent with the public interest." § 5.

[9–13] Finally, we do not think that the exist-

ence of a serious dispute between the parties as to the legal enforceability of the 1956 contract deprived the Commission of power to approve the transaction with the modifications and conditions effectually imposed as between Central and Callan. Nor, finding the existence of power, does it make the grant of that approval erroneous. This is not a merger as such. Hence, the unique limitations as to a mutually acceptable voluntary merger do not apply. St. Joe Paper Co. v. Atlantic Coast Line R. Co., 1954, 347 U.S. 298, 74 S.Ct. 574, 98 L.Ed. 710; cf. Louisville & Nashville R. Co. et al.-Control-Interstate Railroad Co., Finance Docket No. 20763, December 4, 1959. As to a proposed acquisition, the applicant is the party who proposes to acquire. § 5(2) (a).[15] The carrier being acquired is not a party. The Commission's responsibility is not that of a court sitting to enforce a contract. Its responsibility is to determine whether, on the statutory standards relating to public interest, it will approve acquisition on the proposed or modified terms. Indeed, its power and duty is to impose "such terms and conditions and such modifications as it shall find to be just and reasonable. * * *." § 5(2) (b). Its order therefore, is permissive only. New York Central Securities Corp. v. United States, 1932, 287 U.S. 12, 26, 53 S.Ct. 45, 77 L.Ed. 138; O. C. Wiley & Sons v. United States, W.D.Va., 1949, 85 F.Supp. 542, 544, affirmed 338 U.S. 902, 70 S.Ct. 308, 94

[15] Under § 5(2) (b), the application is to be filed by the "carrier or carriers or person seeking authority." See also Trucking Co., Inc.—Purchase—Harwood Trucking, 50 MCC 613, 620 (1948).

L.Ed. 555; Benton v. United States, M.D.Ga., 1953, 114 F.Supp. 38, 43; and see many other cases cited recently in Texas & New Orleans R. Co. v. Brotherhood of Railroad Trainmen, 5 Cir., 1962, 307 F.2d 151 at note 4 and preceding appended text [No. 19164, July 6, 1962]. It does not compel action by either the applicant or the carrier-to-be-acquired. The Commission's power to grant a § 5 approval for acquisition is not limited to the existence of a legally enforceable contract. If that were so, the Commission as a condition precedent to the exercise of its statutory responsibility would have to determine the threshold question of legal enforceability of the contract. That, of course, would put the Commission in the business which the Commission and the Courts have long recognized to be a matter for the Courts. Apart from the question of Commission approval for consummation of a contract, legal validity of such a contract presents a judicial question for judicial determination by the Courts, not the Commission. Watson Bros. Transportation Co. v. Jaffa, 8 Cir., 1944, 143 F.2d 340, 346; Texas & New Orleans R. Co. v. Brotherhood of R. Trainmen, 5 Cir., 1962, 307 F.2d 151, supra; O. C. Wiley & Sons v. United States, supra. And, as a reviewing Court, our function is no more extensive than that of the Commission in this regard. See Louisiana Development Co., Inc. v. United States, E.D.La., 1937, 18 F.Supp. 629, 632; United States v. Jones, 1949, 336 U.S. 641, 672-673, 69 S.Ct. 787, 93 L.Ed. 938; Great Northern Ry Co. v. United States, 1928, 277 U.S. 172, 182, 48 S.Ct. 466, 72 L.Ed. 838; Pittsburg & W. Va. Ry. Co. v. United States, 1930, 281

U.S. 479, 488, 50 S.Ct. 378, 74 L.Ed. 980; New York Central Securities Corp. v. United States, 1932, 287 U.S. 12, 53 S.Ct. 45, 77 L.Ed. 138.

[14] By recognizing, as between Central and Callan, the assignment covering the W & H stock owned by Walker, and by the imposition on Callan of all actual, immediate and ultimate liability for the obligations which Central has toward Walker for the purchase of his W & H stock, the Commission has approved consummation of the 1956 contracts. It has clothed Central with full authority and financial means (through Callan) to comply fully with Central's obligations to Walker under the 1956 contracts So far as Commission approval is concerned, nothing further is needed. The approval given is in no sense restricted or limited merely because acquisition of Walker's W & H stock by Central is a momentary one and takes place simultaneously with the ultimate acquisition of it by Callan as the assignee of Central. The requirement of the law for a § 5 and § 214 approval and a like requirement of the contract[16] has thus been satisfied. While this holding by the Commission, approved by us, is categorical and is binding upon the parties and all courts adjudicating the controversy growing out of the contracts, neither the Commission nor

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[16] The contract covering Express stock provided: "It is agreed that this contract shall be immediately submitted to the Interstate Commerce Commission for approval, and all parties agreed to cooperate and to use due diligence to secure said approval, and that this contract is subject to such approval. * * *." The contracts concerning Cartage and W & H were contingent upon approval of Express contract.

this Court has, or has undertaken, to determine any other issue concerning the interpretation, application, validity, or enforceability of any one or more or all of the contracts. These matters, as we have said, are for determination by the courts in the normal way.

It follows that the complaint must be dismissed and the orders of the Commission under review are approved.

Complaint dismissed.

BEN H. RICE, Jr., District Judge (dissenting).

Since I can not agree to the rationale or to the end result of the majority opinion referred to me by the other members of this Court, I most respectfully dissent. The contracts under consideration were integrated and were expressly made subject to the approval of the Interstate Commerce Commission. In my opinion the Interstate Commerce Commission has never approved these contracts.

Final Judgment and Decree of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

J. L. WALKER,

Plaintiff

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CENTRAL FREIGHT LINES, INC.,
and W. W. CALLAN,

Defendants

Final Judgment and Decree

The above entitled cause having been heard before a duly constituted United States District Court of Three Judges convened pursuant to Section 2325 of Title 18, United States Code, and the Court having considered the pleadings, evidence, briefs, and oral arguments, and having entered its opinion on August 10, 1962, with Judge Ben H. Rice, Jr., dissenting, finding that the complaint should be dismissed; and the Court thereafter having requested that counsel exchange views on the final judgment to be entered, it is hereby:

ORDERED, ADJUDGED and DECREED, in accordance with the opinion of the Court, that the complaint herein be, and it is hereby this date dismissed, complainant to pay all costs.

It is further ORDERED, ADJUDGED and DECREED that all injunctions and restraining orders enjoining and restraining Central Freight Lines Inc., W. W. Callan, Louis E. Hart, and their respective attorneys of record, and the Honorable Eugene C. Williams, Judge of the District Court, 131st Judicial District, Bexar County, Texas, from proceeding to trial in Cause F-116,334, styled J. L. Walker v. Central Freight Lines Inc., et al., in the 131st Judicial District Court in Bexar County, Texas, be and they are hereby this date terminated and dissolved; but this part of the judgment shall be, and hereby is, stayed for a period of 30 days from this date to enable plaintiff to prosecute an appeal.

This the 11th day of September, 1962.

/s/ JOHN R. BROWN
United States Circuit Judge

/s/ BEN H. RICE
United States District Judge

/s/ JOE INGRAHAM
United States District Judge

Interstate Commerce Commission

Order of June 4, 1959

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of June, A. D. 1959.

No. MC-F6339

CENTRAL FREIGHT LINES, INC.—CONTROL —ALAMO EXPRESS, INC.

Finance Docket No. 19431

CENTRAL FREIGHT LINES, INC.—NOTES

Upon consideration of the record in the above-entitled proceedings, of applicants' petition filed February 26, 1959, for reconsideration and modification of the report and order of January 13, 1959, and of the replies by (a) J. L. Walker, filed March 13, 1959 (b) Red Arrow Freight Lines, Inc., filed March 17, 1959, and (c) Brown Express et al., filed March 25, 1959; and

It appearing, That by the report and order of January 22, 1959, which report and order are made a part hereof, in No. MC-F6339 (a) acquisition by Central Freight Lines, Inc., of control of Alamo Express, Inc., and Alamo Cartage Company through purchase of their capital stock, (b) merger of the property of Alamo Cartage Company into Central Freight Lines, Inc., for ownership, management, and operation, (c) acquisition by W. W. Callan of control of W & H Investment Company through purchase of capital stock, (d) Purchase by Central Freight Lines, Inc., of certain property of W & H Investment Company, and (e) acquisition by W. W. Callan of control of Alamo Express, Inc., through the acquisition by Central Freight Lines, Inc., were approved and authorized, subject to conditions,

among others, providing (1) that the assignment of September 4, 1957, to W. W. Callan of the contract of June 30, 1956, for the purchase by Central Freight Lines, Inc., of the capital stock of W & H Investment Company, insofar as such assignment embraces the purchase of the stock owned by J. L. Walker, be cancelled, and that there be substituted therefor a new contract providing for a direct purchase by W. W. Callan from J. L. Walker, and that W. W. Callan shall file with this Commission a verified original and two conformed copies of the instrument under which such acquisition of stock has been accomplished, and (2) that prior to or coincidentally with consummation, of the transaction, Alamo Express, Inc., (a) shall discontinue all operations in interstate or foreign commerce under partial exemption of the second proviso of section 206 (a) between San Antonio and Houston, Texas, via Rosenberg, Victoria, Cuero, and Kenedy, Texas by virtue of its lease of Texas intrastate certificate No. 2186, (b) shall file an appropriate request for amendment of its Form BMC-75, statement in No. MC-107727 (Sub-No. 10), to exclude said route from among those operated under the proviso, and (c) shall obtain from the appropriate State authority a cancellation of that portion of its Texas intrastate certificate No. 3528, authorizing intrastate operations between the same termini over U. S. Highway 90, advising this Commission to that effect;

It further appearing, That, in lieu of condition (1) described above, a condition requiring W. W. Callan to give a surety bond to protect Central Freight Lines, Inc., against his failure to perform

under the contract of June 30, 1956, would adequately cover the eventuality that the contingent liability of Central Freight Lines, Inc., might ripen into over capitalization, and would not interfere in matters pertinent to interpretation of the assignment and enforcement of the contract, which are properly for judicial determination;

And It further appearing, That in lieu of condition (2)(c) described above, a condition proposed by petitioners, requiring that Alamo Express, Inc., cease all operations in interstate or foreign commerce under the partial exemption of the second proviso of section 206(a), between San Antonio and Houston, Texas, over U. S. Highway 90, and file an appropriate request for amendment of its Form BMC-75 statement in No. MC-107727 (Sub-No. 9) to exclude said route from among those operated under the proviso, would adequately protect the situation:

It is ordered, That the said report and order of January 22, 1959, be and they are hereby, modified by substituting in lieu of the above-described condition: (1) That W. W. Callan shall furnish a bond or other security approved by the Commission in an amount and form which will insure his financial responsibility and performance under the assignment of September 4, 1957, of the contract of June 30, 1956, for the purchase by Central Freight Lines, Inc., of the capital stock of W & H Investment Company; and (2) that if the transaction herein authorized is consummated, and coincidentally therewith, all operations in interstate or foreign commerce by

Alamo Express, Inc., or any person affiliated with it, under the partial exemption of the second proviso of section 206(a), between San Antonio and Hopston, via Rosenberg, Victoria, Cuero, and Kenedy, Texas, by virtue of possession, by lease or otherwise, of Texas intrastate Certificate No. 2188, an dbetween the same termini, over U. S. Highway 90, by virtue of possession, by lease or otherwise, of Texas intrastate certificate No. 3528, shall be discontinued, and appropriate amendments of the Form BMC-75 statements on file with this Commission, shall be filed accordingly.

Aand it is further ordered, That, as expressly modified hereby, the said order of January 22, 1959, shall be effective on July 13, 1959.

By the Commission

HAROLD D. McCOY
Secretary

(SEAL)

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No. 657

Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 657

J. L. WALKER, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

In June 1956 Central Freight Lines, Inc., entered into contracts with J. L. Walker, the appellant, and Louis E. Hart to purchase all of the capital stock of Alamo Express, Inc., and two affiliated non-carriers (Alamo Cartage and W. & H. Investment Company). Appellant owns 52.6 percent of the stock of these corporations and Louis E. Hart the remaining 47.4 percent. Under the terms of the contracts, Central was to issue unsecured promissory notes of $900,000

to appellant and $600,000 to Hart, and make cash payments for a total purchase price of $2,000,000 (J.S. 4–5, 27).[1]

In July 1956 Central and W. W. Callan (Central's president and majority stockholder) applied to the Interstate Commerce Commission for approval of the transaction under Section 5 of the Interstate Commerce Act, 49 U.S.C. 5 (Appendix, *infra*, p. 9). Initially, the Commission withheld approval of the transaction because it foresaw that the issuance by Central of the notes necessary to consummate the transaction would result in Central's overcapitalization. *Central Freight Lines, Inc.—Control—Alamo Express, Inc.*, 70 M.C.C. 610 (1957). Thereupon Central filed a petition for reconsideration in which it advanced proposals for meeting the overcapitalization problem. Following a number of further proceedings, the Commission, by orders of January 22, 1959 (75 M.C.C. 731), June 4, 1959 (J.S. 46), and February 19, 1962 (90 M.C.C. 246), "approved consummation of the 1956 contracts. It * * * clothed Central with full authority and financial means (through Callan) to comply fully with Central's obligations to Walker under the 1956 contracts" (J.S. 42).

The problem of overcapitalization was obviated by authorizing the following method of financing: Central may issue all the notes necessary to complete the purchase of the capital stock of the three companies—

[1] While the initial contracts required notes totalling $1,500,000, supplemental agreements between Hart, the minority stockholder, and the appellees Central and Callan obviated the need for $300,000 of these notes (90 M.C.C. 246, 247, note 2; J.S. 28, note 6).

Alamo Express, Alamo Cartage and W & H—from Walker in accordance with the exact terms of the 1956 contracts; but before issuance of the note necessary for the purchase of Walker's W & H stock, Central must receive payment of the full face value of the note in cash from Callan; and in exchange for this cash Callan may receive the W & H stock from Central (J.S. 34, 42; 90 M.C.C. at 247–249).

Appellant, a party to the 1956 purchase contracts, brought this action to set aside the Commission orders approving consummation of the contracts.

The three-judge district court expressed doubt as to the appellant's standing to bring this action (J.S. 37), but went on to dismiss the complaint on the merits (J.S. 26–43). Judge Rice dissented.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. Appellant lacks standing to challenge the Commission's action. The Commission order of June 4, 1959 (J.S. 46), upon which appellant focuses his attack (J.S. 12–20), permitted Central to assign to Callan, its president, its contract right to purchase the W & H stock, rather than have Callan purchase the stock directly from appellant as authorized by a prior Commission order of January 22, 1959 (75 M.C.C. 731, 757). Appellant's basic contention is that the Commission is forcing upon him a contract to which he never assented.

Initially, appellant's contention has been rendered moot by the Commission's order of February 19, 1962

(90 M.C.C. 246), which eliminates his objections to the order of June 4, 1959. The February 19 order authorizes Central itself to purchase the W & H stock directly from Walker exactly as provided in the 1956 contracts. But even if the February 19 order had approved consummation of a transaction which varied from that set forth in the 1956 contracts, appellant would have no grounds for objection here. His contention misconceives the nature of the Commission's order which does not require appellant to dispose of his stock or obligate him in any manner to consummate any particular transaction. Nor, for that matter, does the order obligate Central or Callan to acquire any stock. Any obligation results from the contracts made by the parties. Whether or not the appellant must go through with his contracts is a matter of private contract law, which the parties must litigate in the courts and not before the Commission (J.S. 40). *Watson Bros. Transportation Co.* v. *Jaffa*, 143 F. 2d 340, 346 (C.A. 8); *Texas & New Orleans R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151 (C.A. 5). Since the Commission's order is merely permissive in nature, holding that consummation of the contracts would not violate Section 5 of the Interstate Commerce Act, the appellant is not aggrieved and therefore lacks standing to challenge the action. *Benton* v. *United States*, 114 F. Supp. 37, 43 (M.D. Ga.); and see *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U.S. 479, 486; *Moffat Tunnel League* v. *United States*, 289 U.S. 113, 119–120; *Jersey City* v. *United States*, 101 F. Supp. 702 (D. N.J.).

2. In any event, appellant errs in his view of the merits. The appellees sought to cure the infirmity of the overcapitalization of Central by providing for an assignment of Central's rights and obligations under the contract to Callan, with Central to act merely as a conduit to enable consummation of the transaction (J.S. 34–35, 46). Appellant argues that the Commission is without power to approve this proposal of Central and Callan because he never assented to it.[*] However, the Commission's orders do not vary any of appellant's rights and obligations under his contracts with Central. Walker is getting exactly what he bargained for in his contracts (J.S. 42).

Nor is *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, relevant. That was a case where

[*] Appellant also attacks the prior report and order of January 22, 1959 (75 M.C.C. 731), arguing that the Commission was not authorized to entertain any "modified transaction," which had not been consented to by appellant, and that the 1957 order withholding approval of the transaction because of the overcapitalization problem was the "final action" of the Commission (J.S. 49). This argument is similarly without merit, since the subsequent orders of the Commission did not affect any of the appellant's rights or obligations under his contract. Furthermore, appellant did not make this argument before the Commission, but on the contrary supported the validity of the January 22, 1959, order before the Commission. See appellant's "Reply and Brief to Petition for Reconsideration and Modification Filed February 26, 1959," filed with the Commission on March 13, 1959, pages 1–2; and "Petition for Reconsideration of the Order of the Commission of June 4, 1959," filed June 29, 1959, pages 12–13. Hence this argument is foreclosed to the appellant because it was not raised before the Commission. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37; *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498–501.

the Court held that the Commission did not have the power to propose and require consummation of a merger to which the carriers involved had not agreed. All the Commission's order does in this case is to *permit* the applicant (Central) to consummate a contract agreed to by the parties.

3. Appellant makes various procedural arguments which are similarly without merit.

The Commission's orders of January 22, 1959 (75 M.C.C. 731, 737), and June 4, 1959 (J.S. 46), approving the transaction, provided authority to Central to issue $750,000 of notes. This suit followed. The district court, noting that the 1956 contracts would require Central to issue notes totalling $1,200,000, at first remanded the proceedings "for clarification whether the approval of the § 5 application does or does not constitute appropriate authorization under § 214 for the issuance of the promissory notes to Walker (and Hart as appropriate) as called for in the initial contracts of June 30, 1956" (*Walker* v. *United States*, 204 F. Supp. 918, 921 (W.D. Tex.)).[3]

In the proceedings on the remand, the Commission entertained and approved a further application authorizing Central to issue to appellant, in addition to the $750,000 it had previously authorized, a note of $450,000. *Central Freight Lines, Inc., Note*, 90 M.C.C. 246.

Appellant contests the propriety of the Commission's entertaining Central's application to issue the

[3] See note 1, p. 2, *supra*.

[4] The pertinent provisions of Sections 5 and 214 of the Interstate Commerce Act are printed in the Appendix, *infra*, pp. 9–10.

additional note of $450,000 during the proceedings on remand (J.S. 20–23). But as the court below held, the Commission acted strictly in accordance with the scope of the mandate intended by the court. The remand order expressly anticipated "further proceedings" and "supplemental orders or reports." *Walker v. United States*, 204 F. Supp. at 921. The district court itself emphasized "the broad latitude we afforded the Commission in its reconsideration under our interim remand" (J.S. 29), and expressly stated "our [remand] order invested it [the Commission] with adequate authority to undertake such proceedings as in the Commission's judgment might be required" (J.S. 32–33). At any rate the appellant, who had alleged that the prior orders authorized consummation of a transaction to which he had not agreed, is in no way aggrieved by the proceedings which corrected this alleged infirmity.

Petitioner further contends that the Commission's order of June 4, 1959, which varied its order of January 22, 1959, is not supported by findings and conclusions to show why the Commission permitted Central to assign to Callan the right to purchase the W. & H stock, rather than have Callan purchase directly from appellant. This contention is without merit. The Commission's lengthy order of June 4, 1959, whether read alone or in conjunction with the report and order of January 22, 1959, which are expressly made a part thereof (J.S. 46), plainly shows that the Commission permitted the assignment by Central to Callan because this provided another

acceptable method of curing the infirmity of the overcapitalization of Central.[5]

CONCLUSION

For these reasons, the judgment should be affirmed.

Respectfully submitted.

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JANUARY 1963.

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[5] Contrary to appellant's contention (J.S. 23–24), the mere passage of time does not deprive the Commission of power under Sections 5 and 214, 49 U.S.C. 5, 314, to approve the transaction here involved. Nor is there any merit to appellant's contention that he was not given a hearing following the remand (J.S. 24) in view of the conclusion of the Commission (90 M.C.C. 246, 249), which the lower court upheld (J.S. 36), that appellant alleged no facts which were deemed to require an additional hearing and further delay.

APPENDIX

Section 5 of the Interstate Commerce Act, 49 U.S.C. 5, provides in pertinent part as follows:

Sec. 5.

* * * * *

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *

Section 214 of the Interstate Commerce Act, 49 U.S.C. 314, provides as follows:

Sec. 214. Common or contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs 2 to 11, inclusive, of section 20a of part I of this Act (including penalties applicable in cases of violations thereof): *Provided, however,* That said provisions shall not apply to such carriers or corporations where the value of capital stock or principal amount of

other securities to be issued, together with the value of capital stock and principal amount of other securities then outstanding, does not exceed $1,000,000, nor to the issuance of notes of a maturity of two years or less and aggregating not more than $200,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of capital stock having no par value, the value thereof for the purpose of this section shall be the fair market value as of the date of its issue; and in the case of capital stock having par value, the value for the purpose of this section shall be the fair market value as of the date of its issue, or the par value, whichever is the greater * * *.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 657

J. L. WALKER, *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CENTRAL FREIGHT LINES INC., and W. W. CALLAN, *Appellees*

On Appeal from the United States District Court for the Western District of Texas San Antonio Division

MOTION TO AFFIRM

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filed a formal pleading seeking the outright dismissal of the 'new' application. He was not denied the right to participate in it. Indeed, he seemed to regard it with disdain." (208 F. Supp. at 839-840.)

As the court properly observed, the Commission's jurisdiction "over carrier issuance of securities is "exclusive and plenary." The governing statute, 49 U.S.C. § 20a, par. (7), reads as follows:

"The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

Discussing fully that "exclusive and plenary" jurisdiction and referring to court and Commission cases dealing with Commission authority over issuance of carrier securities, the court concluded (208 F. Supp. at 391):

"Reading all of these Commission reports, including the two latest ones in the Walker-Central series, together, practically all of the points urged so vigorously by Walker now wash out."

It is eminently clear that the Commission has only authorized, permissively and as consistent with the public interest the transaction presented, including issuance of the contemplated notes. The court below has found that this action of the Commission is in conformity with law. Nothing more is involved. Appellant fails to show wherein the controlling statute has been violated. Thus there are no substantive issues raised by appellant and the case does not warrant the consideration of this Court.

[illegible] Corporation Fire-proof Warehouse Co., 40 M.C.C. 557 (1946), the Interstate Commerce Commission, relying upon its "exclusive and plenary" authority under Section 5(11) of the Act (49 U.S.C. 11) approved the control in spite of the fact that a court decree had issued purporting to determine rights of the very parties then litigating those rights before the Commission. See 40 M.C.C. 557 at 560-567; Central Pacific Ry. Co. Control, 76 I.C.C. 508 (1923); United States v. Southern Pacific Co., 259 U.S. 214 (1922).

of approval in the January order. The final approval, at 90 M.C.C. 240, authorizes Central to give Walker directly everything he bargained for in his contract and renders moot the challenge to validity of the order of June 4, 1959. Walker's consent to the latter order is not necessary; moreover, it does not purport to direct any action on his part.

It is urged that the Commission, in view of the pendency of the proceeding in the court below, was without authority to enter its order authorizing Central to issue an additional $150,000 in promissory notes (1, S. 3, 21-24).

On this point the court below said:

"* * * it is plain * * * that three things were contemplated. First, it was recognized that the Commission had to hold further proceedings. * * * Second, we recognized that its action might be in several papers as we referred to 'the supplemental orders or reports' which the Commission would issue. Third, and of more importance, we expressly required that 'the Commission indicate with appropriate required specifications its findings, reasons and conclusions with respect to the total amount of promissory notes payable to Walker * * * which Central is authorized under § 214 to issue.' 204 F. Supp. 921. We italicize the word 'is' to emphasize that we were seeking current, contemporary determination by the Commission. We were not concerned merely with previous determinations." (208 F. Supp. at 392)

The court added:

"* * * Walker's contention that this supplemental order is invalid because wholly in camera' is unfounded. Walker had notice of the application and

---

[1] So to argue is to attack collaterally what appellant failed to attack directly. The assailed order is permissive, and such an order may not be attacked collaterally. Simpson v. South Western Railroad Company, 231 F. 2d 59 (5th Cir. 1956), cert. denied, 352 U.S. 828.

Callan petition, and fully consistent with the broad results
order of January 22, in accordance with the (Central-
stitute a workable condition for one unworkable in the
What the order of June 4, 1959, did was merely to sub-

the Commission is authorized to modify its orders and "to
Further, by Section 204(a)(6) [49 U.S.C. § 304(a)(6)],
make all necessary orders."

it may deem necessary or appropriate."
order made under paragraph (1), (2) or (7), as
cause shown, make such orders, supplemental to any
"The Commission may from time to time, for good

under Section 5(9) of the Act [49 U.S.C. § 5(9)]:

tions, so found to be just and reasonable." Moreover,
"upon the terms and conditions, and with the modifica-
merce Act [49 U.S.C. § 5(2)(b)] which authorize orders
provisions of Section 5(2)(b) of the Interstate Com-
to petition of appellees (Central and Callan and under
is invalid falls of its *own weight*. It was issued pursuant
Argument that the Commission's order of June 4, 1959,

or modified terms. * * *"
interest, it will approve acquisition on the proposed
whether, on the statutory standards relating to public
enforce a contract. Its responsibility is to determine
sion's responsibility is not that of a court sitting to
carrier being acquired is not a party. The Commis-
party who proposes to acquire. § 5(2)(a). The
1959. As to a proposed acquisition, the applicant is the
Found Co., Finance Docket No. 20763, December 4,
Paper Co. v. Atlantic Coast Line R. Co., 1954, 347
U.S. 295, 74 S.Ct. 574, 98 L. Ed. 710; cf. Louisville
& Nashville R. Co. et al.—Control—Interstate Rail-
existence of power, does it make the grant of that
approval erroneous. This is not a merger as such.
Hence, the unique limitations as to a mutually ac-
ceptable voluntary merger do not apply. See, e.g.,
as between Central and Callan. Nor, finding the
the modifications and conditions effectually imposed
mission of power to approve the transaction with
enforceability of the 1956 contract deprived the Com-

railroads would, it has been feared, almost certainly be adversely affected. Shippers and communities adequately served by railroad A may suddenly find themselves unfavorably dependent upon railroad B. Investors in one railroad would, contrary to their expectations, find their holdings transmuted into securities of a different railroad. * * *" (347 U.S. at 306).

It will be observed that none of the reasons which the Court noted for Congressional hostility to involuntary mergers apply to acquisitions of control. Thus, it is fair to say that the legislative history underlying Section 5 indicates a deliberate intent on the part of Congress to treat acquisitions of control somewhat differently than carrier mergers. In other words, the legislative history fully supports the explicit provisions of the statute which do distinguish between the two situations.

Let there be no confusion. There is nothing involuntary about the transaction involved in the case at bar. Appellant did enter into a contract with Central by which he agreed to sell to Central the controlling stock in Alamo. In reliance upon that contract Central filed its application for authority to consummate the transaction. Appellant now does not like the bargain and seeks to cast itself in the role of an involuntary party. But even a cursory examination of the facts will disclose that this is not the situation.

The ultimate controversy here grows out of and revolves around the contract which Walker voluntarily made with Central. Any obligations that Walker may have grow out of that contract, not from the decision of the Commission. The question presented to the court below was the lawfulness of the action taken by the Commission in approving Central's application to acquire control of Alamo. The court below correctly held (208 F. Supp. at 395):

"Finally, we do not think that the existence of a serious dispute between the parties as to the legal

the Commission seeking its approval. In support of that proposition appellant relies upon the decision of this Court in *St. Joe Paper Co. v. Atlantic C.L.R. Co.*, 347 U.S. 298 (1954); but that decision does not support appellant's position.

Reference to Section 5 (2) (a) of the Act, 49 U.S.C. § 5 (2) (a), will disclose that specific provision is contained therein "for two or more carriers to consolidate or merge their properties or franchises" as well as specific provision for "any carrier * * * to acquire control of another through ownership of its stock." Subsection (b) of Section 5 (2), 49 U.S.C. § 5 (2) (b), then provides that "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers * * * seeking authority therefor shall present an application * * *." There is plainly an explicit statutory distinction between mergers of carriers, on the one hand, and acquisitions of control, on the other. In the first instance the statute contemplates that the carriers party to a merger will together come before the Commission, while in the second instance the statute explicitly provides that the carrier seeking to acquire control of another will file its application for authority.

The *St. Joe Paper* case dealt solely with the merger of two carriers and not with the acquisition-of-control situation. And the holding in the case was only that the Commission is not empowered to compel a merger between carriers. In the course of its decision, the Court reviewed the legislative history underlying Section 5 from which it concluded that Congress had deliberately withheld from the Commission the power of initiating mergers between railroads. And the Court went on to note the reasons for Congressional hostility toward involuntary railroad mergers. It said:

> "The reasons for this hostility to mergers imposed by the Commission derive largely from the disadvantages attributed by Congress to such far-reaching corporate revamplings. Employees of the constituent

that under a series of Supreme Court decisions it was clear that the Commission in cases arising under Section 5 has nothing to do with private rights. The court in the Missouri Pacific case then held:

"• • • These cases establish not only that the Interstate Commerce Commission, in determining whether it will exercise a power conferred or perform a duty imposed upon it, has no power to take into consideration collateral matters, such as private rights, but also that the courts in an attack made upon its order have no power to consider same. The sole question is whether the commission was empowered or required to make the order and had considered the conditions upon which it was empowered and required to make it and determined that they existed. Indeed, the matter can be pushed further. Even if it were conceded that the Texas & Pacific had rights under the Gould-Huntington agreement which the acquisition of control of the Cotton Belt by the Southern Pacific might result in the violation thereof, the commission had power to make the order complained of upon its determination that the public interest called for such acquisition. Louisville & N. R. Co. v. Motley, 219 U.S. 467, 31 S. Ct. 265, 55 L. Ed. 297; 34 I.R.A. (N.S.) 671; Kansas City So. R. Co. v. United States, 231 U.S. 423, 34 S. Ct. 125, 58 L. Ed. 296, 52 I.R.A. (N.S.) 1; New York v. United States, 257 U.S. 591, 42 S. Ct. 239, 66 L. Ed. 385." (Emphasis added.) (4 F. Supp. at 456-457.)

Appellant argues that the Commission's order of June 4, 1959, is invalid because it undertakes to approve a transaction not assented to by appellant. (J. S. 14-18). That is, the appellant contends that under Section 5(2) of the Interstate Commerce Act [49 U.S.C. § 5(2)] the Commission may not consider transactions between two carriers unless both carriers voluntarily come before

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The cases cited by the court for this proposition were Cleveland, C. C. & St. L. R. Co. v. United States, 275 U.S. 464 (1928); Pittsburgh and W. Va. R. Co. v. United States, 281 U.S. 479 (1930); and Chicopee-Agawam Ferry Co. v. United States, 285 U.S. 382 (1932).

Louis Railway Company (known as the Big Four). The Commission granted approval under Section 5 (2) and upon judicial review of that decision the contention was made that under applicable state law the New York Central's charter did not authorize a lease of competing lines of railroad. The Supreme Court held that in reviewing the validity of the Commission's action the question of the right of a state to incorporation in a diferent proceeding to challenge the lease as ultra vires was not before it. The Court went on to say:

> "* * * The order of the Commission under § 5 (2) is permissive, not mandatory. There is no warrant for concluding that the Congress intended to fetter the exercise of the Commission's authority by requiring that the Commission before making its order must determine whether the acquisition is within the corporate powers of the carrier under state laws. The Commission has given its approval in the exercise of the authority conferred and the question of corporate powers cannot properly be raised in this suit to set aside the Commission's order. * * *." (287 U.S. at 26-27)

Certainly if the provisions of state law do not invalidate permissive authority granted by the Commission under Section 5 (2) of the Act, no such effect can be given to matters growing out of private contracts. And this too is well settled in law. In Missouri Pac. R. Co. v. United States, 4 F. Supp. 449 (E. D. Ky., 1933), aff'd. 293 U.S. 524, the Missouri Pacific Railroad and the Texas and Pacific Railway Company challenged an order of the Interstate Commerce Commission authorizing the Southern Pacific Company to acquire control of the St. Louis Southwestern Railway Company (the Cotton Belt) on the ground that the transaction would violate a long standing contract between the Texas and Pacific and the Southern Pacific. The court noted that the Commission had held it was not within the Commission's province to construe the agreement between the railroads or adjudicate the rights of the parties thereto. The court went on to point out

mission to acquire control of Alamo and its affiliates. Being permissive, the order requires nothing. It constitutes no adjudication of private rights, does not purport to state whether the transaction will or should be consummated, and does not bind either buyer or seller to act. It does nothing more than find that if the parties to the original transaction desire to consummate it upon those original terms, with the conditions imposed by the Commission to protect Central against possible overcapitalization, they may do so, and if they do, the acquisition of control will be consistent with the public interest.

Appellant's contentions deal largely with matters of private contractual right. Whether Walker assents to the Commission's order, or now assents to the transaction he entered into as authorized by the Commission, is unimportant at this juncture. As the court below said: "In a broad sort of way this appellant's position therefore is that the Commission may not legally approve the sale which he contracted to make." (208 F. Supp. at 390).

The Commission's authority in cases involving the acquisition of control of one carrier by another under Section 5(2) of the Act (49 U.S.C. § 5) is very broad. McLean Trucking Co. v. United States, 321 U.S. 67 (1944); Canadian Pacific Railway Company v. United States, 158 F. Supp. 248 (D. Minn., 1958); C. C. Wiley & Sons v. United States, 85 F. Supp. 542 (W. D. Va., 1949), aff'd. 338 U. S. 902. In the exercise thereof the Commission is duty-bound to apply the standard of consistency with the public interest and is not required to consider whether one of the parties to a proposed transaction might be unable to consummate the deal because of the law of the state of incorporation. Thus, in New York Central S. Corp. v. United States, 287 U. S. 12 (1932), the New York Central Railroad sought authority to acquire control by lease of the Cleveland, Cincinnati, Chicago & St.

sumed to provisions of the Interstate Commerce Act which provide in pertinent part as follows (49 U.S.C. § 5):

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) * * * for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise * * *.

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission * * *. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable * * *."

The transaction underlying the decision of the Interstate Commerce Commission was proposed by application of Central joined by Allan, as the person in control of Central, after a contract had been executed between Central and appellant for the purchase by Central of all the stock of Alamo and its two affiliates. It should be carefully observed that appellant Walker was not a party to the application presented to the Commission and clearly was not required to be such under the pertinent statutory provisions just quoted.

Of controlling importance to an appreciation of just what is before this Court is an understanding of the nature of the Commission's action. The Commission has done nothing more than to give Central and Allan per-

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[5] The statute puts no time limit on exercise of the Commission's authority to approve. Thus appellant's argument that approval is invalid because long delayed is without support, especially since litigation instituted by appellant has caused the delay.

according to the 1956 contracts, and without overcapitalization.

The court below, in its second report, *Walker v. United States*, 208 F. Supp. 388 (1962), examining the decisions of the Commission, said:

> "* * * we are able to distill from two simultaneous decisions the following: in addition to the authority to issue promissory notes payable to Walker and Hart in the amount of $750,000 in payment for stock in Express and Carriage * * *, Central is also now formally authorized to issue a note payable to Walker in the sum of $450,000 representing the agreed deferred price for his stock in W & H * * *. Thus, an aggregate of $1,200,000 in promissory notes is now approved." (Id. at 393)

The complaint was then dismissed by the lower court.

ARGUMENT

This Court is requested by appellant to review certain orders by the Interstate Commerce Commission authorizing consummation of the stock purchase by one motor carrier and its controlling stockholder of the stock of another such carrier and two affiliates. The assailed finding of the Commission was that "Consummation of the transaction partly by Central and partly by Callan as assignee from Central would be consistent with the public interest, and the terms and conditions of such transaction would be just and reasonable." (90 M.C.C. 96, at 100)

The basic question in the court below, and as properly seen by that court, was whether Commission approval was in accordance with the statute. This the court affirmatively found.

The burden on appellant here, and in the court below, was to demonstrate that the order of the Commission was clearly erroneous. The decision was reached pur-

of a new contract be entered into between Callan and Walker providing for the direct purchase by Callan of the W & H stock from Walker. In response to a petition by Central and Callan, this condition was removed by Commission order of June 4, 1959 (4 S. 45-49) and therein Callan in the event of consummation was directed, as offered in the petition, to furnish an appropriate bond insuring his financial responsibility under the assignment, and thus protecting Central against the possibility of overcapitalization.

Appellant filed suit in a Texas State court to declare the subject contract void and Central counterclaimed for specific performance. That proceeding is still pending. *A. A. Walker v. Central Freight Lines, Inc., et al.*, Docket No. F-11038-H, 181st Judicial District, Bexar County, Texas.

Subsequently complaint was filed by Walker in the court below, challenging the validity of the approval by the Interstate Commerce Commission. Upon argument, that court remanded the matter to the Commission for clarification and further orders "whether the approval of the § 5 application does or does not constitute appropriate authorization under § 214 for the issuance of the promissory notes to Walker and Hart as applied for in the initial contracts of June 30, 1956." *Walker v. United States*, 174 F. Supp. 204 (W. D. Tex., 1961), 90 M.C.C. 96, at 100, 921. In its supplemental report (90 M.C.C. 96, at 100, February 19, 1962) responsive to the remand, the Commission held that in its earlier report it had approved issuance of notes only to a maximum of $750,000. Meanwhile, Central had filed with the Commission an application for authority to issue a $450,000 note to Walker. This authorization was granted in a separate docket. (*Central Freight Lines Inc., Note*, 90 M.C.C. 216 (1962), simultaneously with the foregoing supplemental report. At this stage Central was fully authorized to perform

by another such carrier and its controlling stockholder is lawful.

The contract to buy, made in 1956, was for the purchase by Central Freight Lines (Central) and W. W. Callan (Callan), Central's controlling stockholder, from appellant Walker and one Hart, of all the stock of Alamo Express, Inc., a carrier (Alamo). Alamo (Cartage Company and W & H Investment Company, the latter being affiliates of Alamo. After hearing and an examiner's report, the Commission denied the application on the ground that to assume the obligation Central would be overcapitalized. 70 M.C.C. 610 (1957). Thereafter, Central assigned to Callan the contract to purchase the stock of W & H Investment Company and, as thus modified, the proposal, after further hearing, was the subject of another examiner's report, and a report of the Commission approving the application, with conditions. 75 M.C.C. 731 (1959).

Aggregate purchase price for all the stock was $2,000,000 of which $1,500,000 was to be evidenced by Central's notes, issuance of which required authorization by the Commission. The assignment, supra, reduced the amount of the notes to be issued by Central from $1,500,000 to $750,000. It provided that Callan would acquire control of W & H, leaving Central to acquire control of Alamo Express and Alamo Cartage for $1,000,000 of which $750,000, the original proposal as to these two, would be evidenced by Central's notes.

In its second report the Commission, in finding the overcapitalization removed and in approving the application, attached a condition (75 M.C.C. at 737) that the assignment to Callan, supra, be cancelled and that in lieu there-

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[1] A supplemental agreement made with the other stockholder, Hart, and approved at 75 M.C.C. 731 as a part of the total transaction, is not here involved.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 657

J. I. WALKER,

Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CENTRAL FREIGHT LINES INC., and W. W. CALLAN,

Appellees.

On Appeal from the United States District Court for the Western District of Texas San Antonio Division

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Central Freight Lines Inc. and W. W. Callan move that the judgment of the district court be affirmed.

STATEMENT

This case raises the simple question whether Interstate Commerce Commission approval of authority for purchase of the stock of a motor carrier and its two affiliates

CONCLUSION

These appellees urge that the decision below is clearly correct in upholding the order of the Interstate Commerce Commission. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The judgment of the district court should be affirmed.

Respectfully submitted,

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JANUARY 1963